BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket No. 00-03]

RIN 1557-AB80

Financial Subsidiaries and Operating Subsidiaries

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Proposed rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend its regulations to implement section 121 of the Gramm-Leach-Bliley Act, which authorizes national banks to conduct expanded financial activities through financial subsidiaries. The OCC also is revising its operating subsidiary rule to make conforming changes and streamline procedures for banks that engage in activities through operating subsidiaries.

DATES: Comments must be received by [INSERT DATE 25 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please direct comments to: Docket No. 00-03, Communications Division, Third Floor, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC, 20219. Comments are available for inspection and photocopying at that address. In addition, comments may be sent by facsimile transmission to FAX number (202) 874-5274, or by electronic mail to

REGS.COMMENTS@OCC.TREAS.GOV.

FOR FURTHER INFORMATION CONTACT: Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities or Mitchell Plave, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874-5090.

SUPPLEMENTARY INFORMATION:

Background

Prior to the enactment of the Gramm-Leach-Bliley Act, Public Law 106-102, (GLBA or the Act), national banks generally conducted activities in the bank itself, in an operating subsidiary, or in a subsidiary authorized for national banks to own pursuant to a specific statute (e.g., a bank service company authorized under 12 U.S.C. 1861 et seq.). Section 5.34 of the OCC's regulations governs national bank operating subsidiaries. Under § 5.34, an operating subsidiary may engage in activities that are part of, or incidental to, the business of banking as determined by the OCC. A national bank may acquire or establish an operating subsidiary, or commence a new activity in an existing operating subsidiary, by following specific filing procedures that vary depending upon the nature of the activity and whether the bank meets certain eligibility standards.

Section 5.34(f) also permits national banks to engage through a special type of operating subsidiary in activities that are part of, or incidental to, the business of banking but that are not permissible for the national bank to conduct directly, if the bank satisfies certain safety and soundness conditions. In addition, the bank must meet the definition of "eligible bank" in § 5.3(g) if the subsidiary is to engage in those activities as principal.

On November 12, 1999, the President signed the GLBA, which comprehensively

restructures the statutory framework that governs the financial services industry. Section 121 of the Act adds a new section 5136A to the Revised Statutes that authorizes a national bank to acquire control of, or hold an interest in, a new type of subsidiary called a "financial subsidiary." The GLBA defines a financial subsidiary as a company that is controlled by one or more insured depository institutions, other than a subsidiary that engages solely in activities that national banks may engage in directly (under the same terms and conditions that govern the conduct of these activities by national banks) or a subsidiary that a national bank is specifically authorized to control by the express terms of a Federal statute. A financial subsidiary may engage in specified activities that are financial in nature and in activities that are incidental to financial activities if the bank and the subsidiary meet certain requirements and comply with stated safeguards. A financial subsidiary also may combine these newly authorized activities with activities that are permissible for national banks to engage in directly.

The GLBA does not affect a national bank's authority to own and control an operating subsidiary that engages in activities that are part of, or incidental to, the business of banking and that are permissible for national banks to engage in directly. Thus, once the financial subsidiary provisions of the GLBA take effect, a national bank may continue to own or establish these operating subsidiaries and also may have financial subsidiaries that engage in new activities that the GLBA authorizes.

Description of the Proposal

Financial subsidiaries (new § 5.39)

The OCC is issuing this proposal to implement section 121 of the GLBA by establishing a process under which a national bank may obtain OCC approval to engage in activities

authorized pursuant to section 5136A of the Revised Statutes through a financial subsidiary by filing a written notice with the OCC. The following is a description of the provisions contained in proposed new § 5.39.

Definitions

Section 5.39(d) defines key terms that are used in the proposal. As the GLBA requires, a number of these terms, such as "affiliate," "company," "control," and "subsidiary," have the same meaning that is set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841). Other terms, such as "well managed," "equity capital," "eligible debt,"and "financial subsidiary" have the same definitions that are contained in the GLBA. The term "eligible debt," is defined, in part, as unsecured "long term debt" meeting certain requirements. The proposal defines "long term debt" as any debt obligation with an initial maturity of 360 days or more.

Permissible activities for financial subsidiaries

Sections 5.39(e) and (f) provide a simple format describing the types of activities permissible and impermissible for a financial subsidiary. Under § 5.39(e), a financial subsidiary may engage in activities that are financial in nature or incidental to a financial activity that are not permissible for a national bank to conduct directly (expanded financial activities), as well as activities that may be conducted by an operating subsidiary pursuant to § 5.34 (that is, generally activities that are part of, or incidental to, the business of banking that national banks may conduct directly.) There is no requirement, however, that a financial subsidiary also conduct bank-permissible activities.

Section 5.39(e) also lists the activities that are defined in the Act as "financial in nature." Among other things, this list includes activities that the Board of Governors of the Federal

Reserve System (Board) has determined under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) to be so closely related to banking or controlling or managing banks as to be a proper incident thereto, and activities that the Board has found under section 4(c)(13) of the BHCA (12 U.S.C. 1843(c)(13)) to be usual in connection with the transaction of banking or other financial operations abroad.

The proposal also recognizes that the Secretary of the Treasury (in consultation with the Board) may determine that additional activities are financial in nature or incidental to a financial activity and therefore are permissible for a financial subsidiary. The Act provides specific procedures, not detailed in this proposal, for coordination between the Secretary of the Treasury and the Board in defining financial and incidental activities under this provision.

Section 5.39(f) sets forth activities that the Act specifically denotes as impermissible for financial subsidiaries. These activities include providing annuities and certain types of insurance as principal, real estate development or real estate investment (unless otherwise expressly authorized by law), and certain activities described in new sections 4(k)(4)(H) and (I) of the Bank Holding Company Act of 1956 (BHCA) as added by the GLBA. At the end of the five-year period beginning on November 12, 1999, however, the Board and the Secretary of the Treasury may find by regulation that the activities described in section 4(k)(4)(H) of the BHCA are permissible for financial subsidiaries.

Qualifications

Section 5.39(g) contains three conditions that a national bank must satisfy to acquire control of, or hold an interest in, a financial subsidiary. First, the national bank and each of its depository institution affiliates must be "well capitalized" and "well managed." Those terms are

defined in proposed § 5.39(d) consistent with their definitions in the GLBA. Second, the aggregate consolidated total assets of all financial subsidiaries of the bank may not exceed the lesser of 45 percent of the consolidated total assets of the parent bank or $50 billion. The $50 billion limit is to be adjusted according to an indexing mechanism established jointly by the Secretary of the Treasury and the Board. Third, a bank that is one of the 100 largest insured banks, as determined by the bank's consolidated total assets at the end of the calendar year, must have at least one issue of outstanding "eligible debt" that is rated in one of the three highest investment grade rating categories by a nationally recognized statistical rating organization (eligible debt requirement). If a national bank is one of the second 50 of the 100 largest insured banks, the proposal permits the bank to satisfy the eligible debt requirement if it meets alternative criteria to be set jointly through regulation by the Secretary of the Treasury and the Board. The eligible debt requirement does not apply to a bank that intends to acquire control of, or hold an interest in, a financial subsidiary that engages solely in activities in an agency capacity.

Consistent with the GLBA, the OCC also prohibits a national bank from commencing any expanded financial activity pursuant to section 5136A(a) of the Revised Statutes, or directly or indirectly acquiring control of a company engaged in any expanded financial activity under section 5136A(a) of the Revised Statutes, if the bank or any of its insured depository institution affiliates received a Community Reinvestment Act (CRA) rating of less than "satisfactory record of meeting community credit needs" on its most recent CRA examination prior to when the bank files a notice under § 5.39.

Safeguards

A national bank that establishes or maintains a financial subsidiary must comply with six

conditions. First, for purposes of determining regulatory capital, the bank must deduct the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from the assets and tangible equity of the bank. The term "tangible equity" is defined in § 5.39(d) by reference to the definition of that term in 12 CFR 6.2(g). The bank also may not consolidate its assets and liabilities with those of the financial subsidiary for purposes of determining compliance with regulatory capital requirements.

Second, any published financial statement of the national bank must, in addition to providing information prepared in accordance with generally accepted accounting principles, separately present financial information for the bank in a manner that reflects these capital adjustments. The third and fourth conditions require the bank to establish reasonable policies and procedures to preserve the separate corporate identity and limited liability of the bank and its financial subsidiaries, and to establish procedures to identify and manage financial and operational risks within the bank and the financial subsidiary that adequately protect the bank from these risks.

The fifth condition provides that a financial subsidiary is deemed a subsidiary of a bank holding company and not a subsidiary of the bank for purposes of the anti-tying prohibitions set forth in 12 U.S.C. 1971 et seq.

Finally, consistent with the Act, § 5.39(h)(5) provides that sections 23A and 23B of the Federal Reserve Act (FRA) (12 U.S.C. 371c and 371c-1) apply to certain transactions between a bank and its financial subsidiary. The Act effected this coverage by deeming a financial subsidiary to be an affiliate of the bank and not a subsidiary of the bank for FRA section 23A and 23B purposes. The GLBA exempts from the 10 percent quantitative limit of FRA section

23A(a)(1)(A), however, covered transactions between a bank and any individual financial subsidiary of the bank. Thus, covered transactions between a bank and any one financial subsidiary may exceed 10 percent of the bank's capital and surplus, but are subject to the 20 percent aggregate limit on transactions with all affiliates found in FRA section 23A(a)(1)(B). The proposal also provides that, for purposes of FRA sections 23A and 23B, the bank's investment in a financial subsidiary does not include retained earnings of the financial subsidiary. However, investment in the securities of a financial subsidiary of a bank by an affiliate of the bank are considered to be an investment in those securities by the bank; and any extension of credit by an affiliate of a bank to a financial subsidiary of the bank may be considered an extension of credit by the bank to the financial subsidiary if the Board determines that this treatment is necessary or appropriate to prevent evasions of the FRA or the GLBA.

Procedures

The proposal provides a streamlined process for national banks seeking OCC approval to acquire control of, or hold an interest in, a financial subsidiary, or to commence an expanded financial activity in an existing financial subsidiary. This process is intended to accommodate individual bank preferences by permitting two alternative procedures for obtaining OCC approval.

Under the first option, a national bank may file a "Financial Subsidiary Certification" with the OCC listing the bank's depository institution affiliates and certifying that the bank and each of those affiliates is well capitalized and well managed. Thereafter, at such time as the bank seeks OCC approval to acquire control of, or hold an interest in, a new financial subsidiary, or commence a new expanded financial activity authorized under section 5136A in a financial

subsidiary, the bank may file a written notice with the appropriate district office at the time of acquiring control of, or holding an interest in, a financial subsidiary, or commencing a new expanded financial activity authorized pursuant to section 5136A of the Revised Statutes in an existing financial subsidiary. The written notice must be labeled "Financial Subsidiary Notice," must state that the bank's certification remains valid, and describe the activity or activities to be performed in the financial subsidiary as well as cite to the specific authority permitting the expanded financial activity to be conducted by a financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956, a copy of the order or interpretation should be attached.) The written notice also must demonstrate that the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45% of the bank's consolidated total assets or $50 billion, that the bank will remain well capitalized after making the necessary capital adjustments, and, if applicable, that the bank meets the eligible debt requirement.

Alternatively, a bank may choose to seek approval by filing a combined certification and notification with the appropriate OCC district office at least five business days prior to acquiring control of, or an interest in, a financial subsidiary, or commencing a new expanded financial activity authorized pursuant to section 5136A of the Revised Statutes in an existing financial subsidiary. This type of notice would combine the information from the certification and notice described above, and should be labeled "Financial Subsidiary Certification and Notice."

Because the GLBA specifically states that OCC approval shall be based solely upon specific statutory factors, the OCC believes its approval may occur upon a bank's submission of

information demonstrating satisfaction of these statutory criteria. Thus, under both of the proposed alternatives, OCC approval occurs upon filing the requisite information within the time frames provided. Appropriate remedies exist under current law and OCC regulations to address any situations where a certification or notification is inaccurate, e.g., § 5.13(h) and 18 U.S.C. 1001.

Failure to continue to meet certain requirements

A national bank and its affiliated depository institutions must continue to satisfy the qualification requirements in § 5.39(g)(1) and (2) (well managed, well capitalized, and asset size requirements applicable to its financial subsidiaries) and the conditions in § 5.39(h)(1), (2), (3), and (4) after the bank acquires control of, or an interest in, a financial subsidiary. A national bank that fails to continue to satisfy these requirements is subject to several procedural requirements and OCC remedies. For example, the OCC must give notice to the bank promptly upon determining that the bank does not continue to meet these requirements. Under the proposal, the bank is deemed to have received this notice three days after mailing of the letter by the OCC. Not later than 45 days after receipt of this notice, or any additional time as the OCC may permit, the bank must execute an agreement with the OCC to comply with these requirements.

At any time until the conditions described in the notice are corrected, the OCC may impose limitations on the conduct or activities of the national bank or any subsidiary of the national bank that the OCC determines appropriate under the circumstances and consistent with the purposes of section 5136A of the Revised Statutes. The OCC may require the bank to divest control of a financial subsidiary if the bank does not correct the conditions giving rise to the

notice within 180 days after its receipt of the notice.

A national bank that does not meet the eligible debt requirement may not purchase, directly or through a subsidiary, any additional equity capital of any financial subsidiary. The term "equity capital" is defined in § 5.39(j)(2), consistent with the GLBA, to include, in addition to any equity investment, any debt instrument issued by a financial subsidiary if the instrument qualifies as capital of the subsidiary under Federal or State law, regulation, or interpretation applicable to the subsidiary.

Finally, as required by the GLBA, the OCC will prohibit a national bank from commencing an expanded financial activity pursuant to section 5136A of the Revised Statutes, or directly or indirectly acquiring control of a company engaged in such activities, if the national bank or any of its insured depository institution affiliates received a CRA rating of less than "satisfactory record of meeting community credit needs" on its most recent CRA examination.

Operating subsidiaries (revised § 5.34)

Section 5.34 authorizes national banks to engage through operating subsidiaries in activities that are part of, or incidental to, the business of banking. The proposal changes § 5.34 to be more consistent with the procedural requirements of new § 5.39, to remove unnecessary regulatory burden, and to make other adjustments that are necessary in light of the GLBA.

Current § 5.34 groups permissible operating subsidiary activities into three categories based on the novelty and risk of the activity and prescribes a different approval process depending on the category in which the activity is placed. For example, an adequately capitalized or well capitalized bank that is not in "troubled condition," as defined in § 5.51, may establish or acquire an operating subsidiary to engage in certain activities listed in § 5.34, by

providing the OCC a written notice within 10 days after commencing the activity. In addition, a bank that qualifies as an "eligible bank" may obtain expedited approval of an application to establish or acquire an operating subsidiary that will engage in certain additional activities listed in § 5.34.

This proposal changes several of the procedural requirements for national banks that wish to conduct activities through an operating subsidiary. First, the proposal consolidates and moves activities formerly listed in the expedited processing list into the notice category. Second, the proposal expands the list of notice activities to include other activities that the OCC has found to be part of, or incidental to, the business of banking[1] and has approved on a regular basis for national bank operating subsidiaries. Finally, given the expansion of the notice category, a national bank using the notice procedure must be well capitalized and well managed; the requirement that the bank not be in a "troubled condition" within the meaning of § 5.51 is removed to conform more closely to the financial subsidiary requirements in the GLBA.

The proposal also clarifies that "authorized products" referenced in the GLBA are activities permissible for operating subsidiaries under § 5.34. The term "authorized product" is defined at § 5.34(d)(1) to include certain insurance products that national banks may provide as principal pursuant to the GLBA because, as of January 1, 1999, either the OCC had determined that national banks could provide the product as principal or national banks were lawfully providing the product as principal, and as of that date no court had issued a final judgment overturning the OCC's determination that national banks could provide the product as principal.

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[1]This is not a complete list of activities that are part of, or incidental to, the business of banking. The OCC will review new proposals for activities that may be permissible under this section pursuant to the application procedures contained in § 5.34.

The term "authorized product" does not include title insurance or an annuity the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72). However, providing title insurance as principal is a permissible activity for an operating subsidiary if the national bank or subsidiary thereof was actively and lawfully underwriting title insurance before November 12, 1999, and no affiliate of the national bank (other than a subsidiary) provides insurance as principal.

The proposal also revises § 5.34 to conform to other changes made by the GLBA. First, the OCC has removed former § 5.34(f) from the rule because the GLBA makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly, and that an operating subsidiary conducts its activities subject to the same terms and conditions that apply to the conduct of those activities by its parent bank. Second, the proposal removes the former statement that "each operating subsidiary is subject to examination and supervision by the OCC" and clarifies that the OCC's authority to examine and take action against certain subsidiaries is subject to the limitations and requirements of new section 45 of the Federal Deposit Insurance Act and section 115 of the GLBA. The purpose of this change is to recognize the provisions in the GLBA relating to functional regulation of certain types of bank subsidiaries and affiliates.

Comment Solicitation

The OCC requests comment on all aspects of this proposal, including the specific issues that follow.

The OCC seeks comment on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and

may present a different risk profile. Thus, the OCC specifically requests comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

Second, while as a matter of corporate law a subsidiary of a branch or agency of a foreign bank would technically be a subsidiary of the parent bank, for regulatory purposes the company could be treated as if it were a subsidiary of the branch or agency itself, provided the company is in fact operated in that manner. Thus, the OCC also seeks comment on whether national treatment principles would be furthered if Federal branches and agencies of foreign banks are authorized (as are national banks) to invest in financial and operating subsidiaries, and, if so, how the applicable qualification standards would be applied.

Finally, the OCC requests comment on whether the proposal is written clearly and is easy to understand. On June 1, 1998, the President issued a Memorandum directing each agency in the Executive branch to write its rules in plain language. This directive applies to all new proposed and final rulemaking documents issued on or after January 1, 1999. In addition, Public Law 106-102 requires each federal agency to use plain language in all proposed and final rules published after January 1, 2000. The OCC invites comment on how to make this rule clearer. For example, you may wish to discuss:

(1) Whether we have organized the material to suit your needs;

(2) Whether the requirements of the rule are clear; or

(3) Whether there is something else we could do to make the rule easier to understand.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Comptroller of the Currency certifies that this proposal will not have a significant economic impact on a substantial number of small entities. The principal effect of the rule is to provide procedures for implementing section 121 of the GLBA for national banks that wish to engage in activities through financial subsidiaries. The proposal also would reduce regulatory burden by increasing the number of activities that are subject to notice requirements rather than application requirements where a national bank intends to engage in activities through an operating subsidiary.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the proposal will not result in expenditures by State, local, or tribal governments or by the private sector of $100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 12866 Determination

The Comptroller of the Currency has determined that this rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

Paperwork Reduction Act

The collection of information requirements in this proposal are found in 12 CFR 5.34(b) and (e) and 12 CFR 5.39(b) and (i). These collection of information requirements have been reviewed and approved by the Office of Management and Budget in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(j)) under OMB Control Number 1557-0215.

List of Subjects in 12 CFR Part 5

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend Chapter I of Title 12 as follows:

PART 5--RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

1. The authority citation for Part 5 is revised to read as follows:

Authority: 12 U.S.C. 1 et seq., 93a; and section 5136A of the Revised Statutes, (12 U.S.C. 24a).

2. Section 5.34 is revised to read as follows:

§ 5.34 Operating subsidiaries.

(a) Authority. 12 U.S.C. 24(Seventh), 93a, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

(b) Licensing requirements. A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new

activity in an existing operating subsidiary.

(c) Scope. This section sets forth authorized activities and application or notice procedures for national banks engaging in activities through an operating subsidiary. This section does not apply to financial subsidiaries authorized under § 5.39.

(d) Definitions. For purposes of this § 5.34:

(1) Authorized product means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (Public Law 106-102, 113 Stat. 1338, 1407) (GLBA) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the product as principal. An authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(2) Well capitalized means the capital level described in 12 CFR 6.4(b)(1).

(3) Well managed means, unless otherwise determined in writing by the OCC:

(i) The national bank has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination; or

(ii) In the case of any national bank that has not been examined, the existence and use of managerial resources that the OCC determines are satisfactory.

(e) Standards and requirements -- (1) Authorized activities. A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or

otherwise under other statutory authority, including:

(i) Providing authorized products as principal; or

(ii) Providing title insurance as principal if the national bank or subsidiary thereof was actively and lawfully underwriting title insurance before November 12, 1999, and no affiliate of the national bank (other than a subsidiary) provides insurance as principal. A subsidiary may not provide title insurance as principal if the state had in effect before November 12, 1999, a law which prohibits any person from underwriting title insurance with respect to real property in that state.

(2) Qualifying subsidiaries. An operating subsidiary in which a national bank may invest includes a corporation, limited liability company, or similar entity if the parent bank owns more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary; or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary. However, the following subsidiaries are not operating subsidiaries subject to this section:

(i) A subsidiary in which the bank's investment is made pursuant to specific authorization in a statute or OCC regulation (e.g., a bank service company under 12 U.S.C. 1861 et seq. or a financial subsidiary under section 5136A of the Revised Statutes); and

(ii) A subsidiary in which the bank has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted.

(3) Examination and supervision. An operating subsidiary conducts activities authorized

under this section subject to the same terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety and soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act and section 115 of the Gramm-Leach-Bliley Act.

(4) Consolidation of figures. Pertinent book figures of the parent bank and its operating subsidiary shall be combined for the purpose of applying statutory limitations when combination is needed to effect the intent of the statute, e.g., for purposes of 12 U.S.C. 56, 60, 84, and 371d.

(5) Procedures -- (i) Application required. (A) Except as provided in paragraph (e)(5)(iv) or (e)(5)(vi) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing operating subsidiary, must first submit an application to, and receive approval from, the OCC. The application must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. It also must state whether the bank intends to conduct any activity of the operating subsidiary at a location other than the main office or a previously approved branch of the bank. The OCC may require the applicant to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages applicants to have

a pre-filing meeting with the OCC.

(B) A national bank must file an application and obtain prior approval before acquiring or establishing an operating subsidiary, or performing a new activity in an existing subsidiary, if the bank controls the subsidiary but owns 50 percent or less of the voting (or similar type of controlling) interest of the subsidiary. These applications are not subject to the filing exemption in paragraph (e)(5)(vi) of this section and are not eligible for the notice procedures in paragraph (e)(5)(iv) of this section.

(ii) Exceptions to rules of general applicability. Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant and novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in sections 5.8, 5.10, and 5.11 apply.

(iii) OCC review and approval. The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank. As part of this process, the OCC may request additional information and analysis from the applicant.

(iv) Notice process for certain activities. A national bank that is "well capitalized" and "well managed" may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate district office written notice within 10 days after acquiring or establishing the subsidiary, or commencing the activity, if the activity is listed in paragraph (e)(5)(v) of this section. The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a

representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(v) Activities eligible for notice. The following activities qualify for the notice procedures, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity was being conducted directly by a national bank:

(A) Holding and managing assets acquired by the parent bank, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(B) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(C) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks;

(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(E) Providing courier services between financial institutions;

(F) Providing management consulting, operational advice, and services for other financial institutions;

(G) Providing check guaranty and verification services;

(H) Providing data processing, data warehousing and data transmission products,

services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

(I) Acting as investment adviser or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling;

(J) Providing tax planning and preparation services;

(K) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(L) Underwriting credit life insurance;

(M) Leasing of personal property and acting as an agent or adviser in leases for others;

(N) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;

(O) Underwriting, dealing, and making a market in bank permissible securities including asset backed securities;

(P) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA;

(Q) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share

arrangement, the subsidiary assumes less than 50% of the aggregate insured risk covered by the agreement. A "quota share agreement" is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;

(R) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedents[1];

(S) Offering bank permissible correspondent services to others to the extent permitted by published OCC precedents;

(T) Acting as agent or broker in the sale of fixed or variable annuities;

(U) Offering debt cancellation agreements or debt suspension agreements;

(V) Providing real estate settlement, closing, escrow and related services; or

(W) Acting as a transfer or fiscal agent.

(vi) No application or notice required. A national bank may acquire or establish an operating subsidiary without filing an application or providing notice to the OCC, if the bank is adequately capitalized or well capitalized and the:

(A) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(B) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary; and

(C) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating

subsidiary of the bank.

(vii) Fiduciary powers. If an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26.

3. A new § 5.39 is added to Subpart C to read as follows:

§ 5.39 Financial subsidiaries.

(a) Authority. 12 U.S.C. 93a and section 121 of Public Law 106-102, 113 Stat. 1338, 1373.

(b) Approval requirements. A national bank must file a notice as prescribed in this section prior to acquiring a financial subsidiary or engaging in activities authorized pursuant to section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a) through a financial subsidiary. When a financial subsidiary proposes to conduct a new activity permitted under § 5.34, the bank shall follow the procedures in § 5.34(e)(5) instead of paragraph (i) of this section.

(c) Scope. This section sets forth authorized activities, approval procedures, and, where applicable, conditions for national banks engaging in activities through a financial subsidiary.

(d) Definitions. For purposes of this § 5.39:

(1) Affiliate has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), except that the term "affiliate" for purposes of paragraph (h)(5) of this section shall have the meaning set forth in sections 23A or 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1), as applicable.

(2) Appropriate Federal banking agency has the meaning set forth in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(3) Company has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), and includes a limited liability company (LLC).

(4) Control has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(5) Eligible debt means unsecured long-term debt that is:

(i) Not supported by any form of credit enhancement, including a guaranty or standby letter of credit; and

(ii) Not held in whole or in any significant part by any affiliate, officer, director, principal shareholder, or employee of the bank or any other person acting on behalf of or with funds from the bank or an affiliate of the bank.

(6) Financial subsidiary means any company that is controlled by one or more insured depository institutions, other than a subsidiary that:

(i) Engages solely in activities that national banks may engage in directly and that are conducted subject to the same terms and conditions that govern the conduct of these activities by national banks; or

(ii) A national bank is specifically authorized to control by the express terms of a Federal statute (other than section 5136A of the Revised Statutes), and not by implication or interpretation, such as by section 25 of the Federal Reserve Act (12 U.S.C. 601-604a), section 25A of the Federal Reserve Act (12 U.S.C. 611-631), or the Bank Service Company Act (12 U.S.C. 1861 et seq.)

(7) Insured depository institution has the meaning set forth in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(8) Long term debt means any debt obligation with an initial maturity of 360 days or more.

(9) Subsidiary has the meaning set forth in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(10) Tangible equity has the meaning set forth in 12 CFR 6.2(g).

(11) Well capitalized with respect to a depository institution means the capital level designated as "well capitalized" by the institution's appropriate Federal banking agency pursuant to section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

(12) Well managed means:

(i) Unless otherwise determined in writing by the appropriate Federal banking agency, the institution has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (or an equivalent rating under an equivalent rating system) in connection with the most recent examination or subsequent review of the depository institution and, at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of any depository institution that has not been examined by its appropriate Federal banking agency, the existence and use of managerial resources that the appropriate Federal banking agency determines are satisfactory.

(e) Authorized activities. A financial subsidiary may engage in the following activities:

(1) Activities that are financial in nature and activities incidental to a financial activity, authorized pursuant to 5136A(a)(2)(A)(i) of the Revised Statutes (to the extent not otherwise permitted under paragraph (e)(2) of this section), including:

(i) Lending, exchanging, transferring, investing for others, or safeguarding money or

securities;

(ii) Engaging as agent or broker in any state for purposes of insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, death, defects in title, or providing annuities as agent or broker;

(iii) Providing financial, investment, or economic advisory services, including advising an investment company as defined in section 3 of the Investment Company Act (15 U.S.C. 80a-3);

(iv) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly;

(v) Underwriting, dealing in, or making a market in securities;

(vi) Engaging in any activity that the Board of Governors of the Federal Reserve System has determined, by order or regulation in effect on November 12, 1999, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in the order or regulation, unless the order or regulation is modified by the Board of Governors of the Federal Reserve System);

(vii) Engaging, in the United States, in any activity that a bank holding company may engage in outside the United States and the Board of Governors of the Federal Reserve System has determined, under regulations prescribed or interpretations issued pursuant to section 4(c)(13) of the Bank Holding Company Act of 1956 (BHCA) (12 U.S.C. 1843(c)(13)) as in effect on November 11, 1999, to be usual in connection with the transaction of banking or other financial operations abroad; and

(viii) Activities that the Secretary of the Treasury in consultation with the Board of

Governors of the Federal Reserve System, as provided in section 5136A of the Revised Statutes, determines to be financial in nature or incidental to a financial activity; and

(2) Activities that may be conducted by an operating subsidiary pursuant to § 5.34.

(f) Impermissible activities. A financial subsidiary may not engage as principal in the following activities:

(1) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability or death (except to the extent permitted under sections 302 or 303(c) of the Gramm-Leach-Bliley Act (GLBA) 113 Stat. 1407-1409) or providing or issuing annuities the income of which is subject to tax treatment under section 72 of the Internal Revenue Code (26 U.S.C. 72);

(2) Real estate development or real estate investment, unless otherwise expressly authorized by law; and

(3) Activities authorized for bank holding companies by virtue of section 4(k)(4)(H) or (I) of the Bank Holding Company Act, except activities described in section 4(k)(4)(H) that may be permitted in accordance with section 122 of the GLBA, 113 Stat. 1381.

(g) Qualifications. A national bank may control a financial subsidiary or hold an interest in a financial subsidiary if:

(1) The national bank and each depository institution affiliate of the national bank are well capitalized and well managed;

(2) The aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the consolidated total assets of the parent bank or $50 billion (or such greater amount as is determined according to an indexing mechanism jointly established by regulation by the Secretary of the Treasury and the Board of Governors of the

Federal Reserve System); and

(3) A national bank that is one of the 100 largest insured banks, determined on the basis of the bank's consolidated total assets at the end of the calendar year, has at least one issue of outstanding eligible debt that is currently rated in one of the three highest investment grade rating categories by a nationally recognized statistical rating organization. If the national bank is one of the second 50 largest insured banks, it may either satisfy this requirement or satisfy alternative criteria the Secretary of the Treasury and the Board of Governors of the Federal Reserve System establish jointly by regulation. This paragraph (g)(3) does not apply if the financial subsidiary is engaged solely in activities in an agency capacity.

(h) Safeguards. The following safeguards apply to a national bank that establishes or maintains a financial subsidiary:

(1) For purposes of determining regulatory capital:

(i) The national bank must deduct the aggregate amount of its outstanding equity investment, including retained earnings, in its financial subsidiaries from the assets and tangible equity of the bank; and

(ii) The national bank may not consolidate the assets and liabilities of a financial subsidiary with those of the bank;

(2) Any published financial statement of the national bank shall, in addition to providing information prepared in accordance with generally accepted accounting principles, separately present financial information for the bank in the manner provided in paragraph (h)(1) of this section;

(3) The national bank must have reasonable policies and procedures to preserve the

separate corporate identity and limited liability of the bank and the financial subsidiaries of the bank;

(4) The national bank must have procedures for identifying and managing financial and operational risks within the bank and the financial subsidiary that adequately protect the national bank from such risks;

(5) Sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c-1) apply to transactions involving a financial subsidiary in the following manner:

(i) A financial subsidiary shall be deemed to be an affiliate of the bank and shall not be deemed to be a subsidiary of the bank;

(ii) The restrictions contained in section 23A(a)(1)(A) of the Federal Reserve Act shall not apply with respect to covered transactions between a bank and any individual financial subsidiary of the bank;

(iii) The bank's investment in the financial subsidiary shall not include retained earnings of the financial subsidiary;

(iv) Any purchase of, or investment in, the securities of a financial subsidiary of a bank by an affiliate of the bank will be considered to be a purchase of or investment in such securities by the bank; and

(v) Any extension of credit by an affiliate of a bank to a financial subsidiary of the bank may be considered an extension of credit by the bank to the financial subsidiary if the Board of Governors of the Federal Reserve System determines that such treatment is necessary or appropriate to prevent evasions of the Federal Reserve Act or the Gramm-Leach-Bliley Act.

(6) A financial subsidiary shall be deemed a subsidiary of a bank holding company and

not a subsidiary of the bank for purposes of the anti-tying prohibitions set forth in 12 U.S.C. 1971 et seq.

(i) Procedures to engage in activities through a financial subsidiary. A national bank that intends to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary, may obtain OCC approval through the procedures set forth in paragraph (i)(1) or (i)(2) of this section.

(1) Certification with subsequent notice. (i) At any time, a national bank may file a "Financial Subsidiary Certification" with the appropriate district office listing the bank's depository institution affiliates and certifying that the bank and each of those affiliates is well capitalized and well managed.

(ii) Thereafter, at such time as the bank seeks OCC approval to acquire control of, or hold an interest in, a new financial subsidiary, or commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes in an existing subsidiary, the bank may file a written notice with the appropriate district office at the time of acquiring control of, or holding an interest in, a financial subsidiary, or commencing such activity in an existing subsidiary. The written notice must be labeled "Financial Subsidiary Notice" and must:

(A) State that the bank's Certification remains valid;

(B) Describe the activity or activities conducted by the financial subsidiary;

(C) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956, respectively, a copy of the order or interpretation should be attached);

(D) Certify that the bank will be well capitalized after making adjustments required by paragraph (h)(1) of this section;

(E) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45% of the bank's consolidated total assets or $50 billion; and

(F) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(2) Combined certification and notice. A national bank may file a combined certification and notice with the appropriate district office at least five business days prior to acquiring control of, or holding an interest in, a financial subsidiary, or commencing a new activity authorized pursuant to section 5136A(a)(2)(A)(i) of the Revised Statutes in an existing subsidiary. The written notice must be labeled "Financial Subsidiary Certification and Notice" and must:

(A) List the bank's depository institution affiliates and certify that the bank and each depository institution affiliate of the bank is well capitalized and well managed;

(B) Describe the activity or activities to be conducted in the financial subsidiary;

(C) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956, respectively, a copy of the order or interpretation should be attached);

(D) Certify that the bank will remain well capitalized after making the adjustments required by paragraph (h)(1) of this section;

(E) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the

national bank do not exceed the lesser of 45% of the bank's consolidated total assets or $50 billion; and

(F) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section

(3) Exceptions to rules of general applicability. Section 5.8, 5.10, 5.11, and 5.13 do not apply to activities authorized under this section.

(4) Community Reinvestment Act (CRA). A national bank may not apply under this paragraph (i) to commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes, or directly or indirectly acquire control of a company engaged in any such activity, if the bank or any of its insured depository institution affiliates received a CRA rating of less than "satisfactory record of meeting community credit needs" on its most recent CRA examination prior to when the bank would file a notice under this section.

(j) Failure to continue to meet certain qualification requirements -- (1) Qualifications and safeguards. A national bank, or, as applicable, its affiliated depository institutions, must continue to satisfy the qualification requirements set forth in paragraphs (g)(1) and (2) of this section and the safeguards in paragraphs (h)(1), (2), (3) and (4) of this section following its acquisition of control of, or an interest in, a financial subsidiary. A national bank that fails to continue to satisfy these requirements will be subject to the following procedures and requirements:

(i) The OCC shall give notice to the national bank promptly upon determining that the national bank does not continue to meet the requirements in paragraph (g)(1) or (2) of this section or the safeguards in paragraph (h)(1), (2), (3), or (4) of this section. The bank shall be deemed to have received such notice three business days after mailing of the letter by the OCC;

(ii) Not later than 45 days after receipt of the notice under paragraph (j)(1)(i) of this section, or any additional time as the OCC may permit, the national bank shall execute an agreement with the OCC to comply with the requirements in paragraphs (g)(1) and (2) and (h)(1), (2), (3), and (4) of this section;

(iii) The OCC may impose limitations on the conduct or activities of the national bank or any subsidiary of the national bank as the OCC determines appropriate under the circumstances and consistent with the purposes of section 5136A of the Revised Statutes; and

(iv) The OCC may require a national bank to divest control of a financial subsidiary if the national bank does not correct the conditions giving rise to the notice within 180 days after receipt of the notice provided under paragraph (j)(1)(i) of this section.

(2) Eligible debt rating requirement. A national bank that does not continue to meet the qualification requirement set forth in paragraph (g)(3) of this section may not directly or through a subsidiary, purchase or acquire any additional equity capital of any financial subsidiary until the bank meets the requirement in paragraph (g)(3) of this section. For purposes of this paragraph (j)(2), the term "equity capital" includes, in addition to any equity investment, any debt instrument issued by the financial subsidiary if the instrument qualifies as capital of the subsidiary under federal or state law, regulation, or interpretation applicable to the subsidiary.

DATE: January 14, 2000

John D. Hawke, Jr.,
Comptroller of the Currency